

CLAIM FOUR

THE DEFENDANT'S DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT OF LAW OF THE UNITED STATES CONSTITUTION WAS VIOLATED DUE TO PROSECUTOR MISCONDUCT OF IMPERMISSIBLE CROSS-EXAMINATION ON DEFENDANT'S POST-ARREST SILENCE

EXHAUSTION

The claim for relief was presented to the Post-Conviction Court (within Argument I, p. 36-40 of the Post-Conviction Memorandum) and on appeal thereof (within Argument IV, p. 16-19 of Appellant's Opening Brief) Thus, Cabbage has exhausted remedies as to the claim.

Prosecutor's impermissible cross-examination

In United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133 45 L.Ed.2d 99 (1975), The Supreme Court in the exercise of its supervisory power over federal courts, reasoned that evidence of silence during police interrogation is so ambiguous that it lacks significant probative value and must therefore be excluded. The Delaware Supreme Court adopts the rationale of the United States Supreme Court in United States v. Hale see Bowe v. State, Del. Supr. 514 A.2d 408 (1986)

Mr. Adkins sought to impeach the defendant's exculpatory story. (A-66 Ln. 1-8) "A state prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda Warnings at time of his arrest; use of a defendant's post-arrest silence in such manner violates due process". U.S.C.A Const. Amend. 5, 14; Doyle v. Ohio, 426 U.S. 610, 620, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976) Over defense objection (A-66 Ln. 9-18) the trial judge abused its discretion and permitted the questioning because the defendant didn't mention the alibi

**Petition for Relief From a Conviction or Sentence
By a Person in State Custody**

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.
2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.
3. Make sure the form is typed or neatly written.
4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.
6. You must pay a fee of \$5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds \$ _____, you must pay the filing fee.
7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.
8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

Clerk, United States District Court for DELAWARE
Address
City, State Zip Code
9. **CAUTION:** You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
10. **CAPITAL CASES:** If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District <u>Delaware</u>
Name (under which you were convicted): <u>JARIS L. CUBBAGE</u>		Docket or Case No.: <u>1:05-cv-798 GMS</u>
Place of Confinement: <u>Delaware Correctional Center</u>		Prisoner No.: <u>SBI 00271683</u>
Petitioner (include the name under which you were convicted) <u>JARIS L. CUBBAGE</u>		Respondent (authorized person having custody of petitioner) <u>v. THOMAS CARROLL, Warden, Delaware Correctional Center</u>
The Attorney General of the State of <u>Delaware</u>		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Superior Court of the State of Delaware, Sussex County, Georgetown, De. 19947
 (b) Criminal docket or case number (if you know): 0202007080
2. (a) Date of the judgment of conviction (if you know): October 8, 2002
 (b) Date of sentencing: December 6, 2002
3. Length of sentence: 8 years at Level 5
4. In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
5. Identify all crimes of which you were convicted and sentenced in this case: Robbery 1st - 20 years suspended after six years at level 5
PDWDCF - 2 years at Level 5
Conspiracy 2nd - 1 year at Level 1 probation
Wearing Disguise During Commission of Felony - 2yrs at Level 2 probation
6. (a) What was your plea? (Check one)

(1) Not guilty <input checked="" type="checkbox"/>	(3) Nolo contendere (no contest) <input type="checkbox"/>
(2) Guilty <input type="checkbox"/>	(4) Insanity plea <input type="checkbox"/>

 (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☒ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: Supreme Court of Delaware

(b) Docket or case number (if you know): 005, 2003

(c) Result: Conviction and Sentence were affirmed

(d) Date of result (if you know): June 25, 2003

(e) Citation to the case (if you know): Cabbage v. State, Del. Supr., 827 A.2d 30

(f) Grounds raised: ① The Trial Court Improperly Denied The Defendant's Motion For Judgment Of Acquittal and ② The Evidence Presented Was Insufficient To Sustain The Convictions Against The Defendant

(g) Did you seek further review by a higher state court? Yes ☐ No ☒

If yes, answer the following:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Result: N/A

(4) Date of result (if you know): N/A

(5) Citation to the case (if you know): N/A

(6) Grounds raised: N/A

(h) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐ No ☒

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A(3) Date of result (if you know): N/A(4) Citation to the case (if you know): N/A

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: Superior Court of the State of Delaware, Sussex County
 (2) Docket or case number (if you know): 0202007080
 (3) Date of filing (if you know): April 27, 2004
 (4) Nature of the proceeding: Post-Conviction Relief pursuant to Rule 61
 (5) Grounds raised: See Attachment "A"

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: N/A(8) Date of result (if you know): N/A

(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court: N/A
 (2) Docket or case number (if you know): N/A
 (3) Date of filing (if you know): N/A
 (4) Nature of the proceeding: N/A
 (5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: N/A

(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: N/A

(8) Date of result (if you know): N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☐ No ☒

(3) Third petition: Yes ☐ No ☒

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: The defendant's Due Process of Law was violated when the defense was misled into proceeding to trial unprepared

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The State filed two discovery response with the defense that did not disclose the interview between Detective Hudson and codefendant William Wilson. At trial, the State entered Wilson's Statements into evidence without first disclosing them to the defense.

(b) If you did not exhaust your state remedies on Ground One, explain why: N/A

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: I was represented by Counsel. Superior Court Criminal Rule 47

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post-Conviction Motion

Name and location of the court where the motion or petition was filed: Superior Court of Delaware, Sussex County, Georgetown, De. 19947

Docket or case number (if you know): 0202007080

Date of the court's decision: April 13, 2005

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence were affirmed

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court of Delaware Dover, De. 19901

Docket or case number (if you know): Cabbage v. State 168, 2005

Date of the court's decision: September 20, 2005

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence were affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/A

GROUND TWO: The defendant's Right to Confrontation was violated when the trial judge limited the cross-examination of a codefendant

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The trial judge limited the cross-examination of codefendant Wilson about the 2-21-02 interview between him and Detective Hudson after Wilson testified he admitted his involvement, talked about the incident and he told the truth during this

interview and prohibited the defense from questioning
Wilson about the interview

(b) If you did not exhaust your state remedies on Ground Two, explain why: N/A

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: I was represented
by Counsel - Superior Court Criminal Rule 47

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post-Conviction motion

Name and location of the court where the motion or petition was filed: Superior Court of
the State of Delaware, Sussex County, Georgetown, De. 19947

Docket or case number (if you know): 0202007080

Date of the court's decision: April 13, 2005

Result (attach a copy of the court's opinion or order, if available): Conviction and
Sentence affirmed

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court of
Delaware Dover, De. 19901

Docket or case number (if you know): Cubbage v. State, 168, 2005

Date of the court's decision: September 20, 2005

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

N/A

GROUND THREE: The defendant's Due Process of Law was violated when the State submitted false and prejudicial evidence to gain a conviction

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The prosecutor submitted doorgs and gloves plus pictures of these items which was not connected to the crime into evidence after his own witness, Detective Hudson, had previously testified that the only evidence he had against the defendant was the codefendant's statements

(b) If you did not exhaust your state remedies on Ground Three, explain why: N/A

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: I was represented by Counsel. Superior Court Criminal Rule 47

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post-Conviction motion

Name and location of the court where the motion or petition was filed: Superior Court of the State of Delaware, Sussex County, Georgetown, De. 19947

Docket or case number (if you know): 0202007080

Date of the court's decision: April 13, 2005

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence affirmed

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court of Delaware Dover, De. 19901

Docket or case number (if you know): Cabbage v. State 168, 2005

Date of the court's decision: September 20, 2005

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

N/A

GROUND FOUR: The defendant's Due Process of Law was violated due to prosecutor impermissible cross-examination on defendant's post-arrest silence

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The State was allowed to question the defendant about why he failed to mention his alibi at the time of his arrest

(b) If you did not exhaust your state remedies on Ground Four, explain why: N/A

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: I was represented by Counsel. Superior Court Criminal Rule 47

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post-conviction motion

Name and location of the court where the motion or petition was filed: Superior Court of the State of Delaware, Sussex County, Georgetown, De. 19947

Docket or case number (if you know): 0202007080

Date of the court's decision: April 13, 2005

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence affirmed

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court of Delaware
Dover, De. 19901

Docket or case number (if you know): Cubbage v. State 168, 2005

Date of the court's decision: September 20, 2005

Result (attach a copy of the court's opinion or order, if available): Conviction and Sentence affirmed

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: N/A

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

N/A

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

N/A

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Thomas Barnett 512 East Market St.
Georgetown, De. 19947

(b) At arraignment and plea: Thomas Barnett 512 East Market St.
Georgetown, De. 19947

(c) At trial: John Brady P.O. Box 251 Georgetown, De. 19947

(d) At sentencing: John Brady P.O. Box 251 Georgetown, De. 19947

(e) On appeal: John Brady P.O. Box 251 Georgetown, De. 19947

(f) In any post-conviction proceeding: Jarid Cabbage Pro-se
1181 Paddock Rd. Smyrna, De. 19947

(g) On appeal from any ruling against you in a post-conviction proceeding: Jarid Cabbage
Pro-se 1181 Paddock Rd. Smyrna, De. 19947

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒